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No. 01-298

In The

Supreme Court of the United States

PAUL LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

WHETHER THE STATE'S ACTION IN JOINING IN THE REMOVAL OF A CASE TO FEDERAL COURT WHILE SIMULTANEOUSLY ASSERTING ITS ELEVENTH AMENDMENT IMMUNITY CONSTITUTES A KNOWING AND UNEQUIVOCAL WAIVER OF ITS IMMUNITY.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
A. Removal of This Case Did Not Clearly and Unequivocally Express Georgia's Intent to Permit a Federal Court to Resolve the Claims Barred by the Eleventh Amendment	9
1. The State of Georgia agreed to removal of this action for the benefit of the individual defendants	9
2. Georgia's action in removing this case did not constitute a clear and unequivocal waiver of its Eleventh Amendment immunity	11
3. The Court has never found that a state waived its Eleventh Amendment immunity merely through a state's litigation conduct where the state did not affirmatively assert a claim	13
4. Equity and practical considerations support the State's position	20
B. The Attorney General for the State of Georgia Does Not Have Authority to Waive the State's Eleventh Amendment Immunity	26
CONCLUSION	33
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 7, 8

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 7, 9, 11, 28

Boys Markets Inc. v. Retail Clerk's Union, 398 U.S. 235 (1970) 21, 22

California v. Deep Sea Research, 523 U.S. 491 (1998) 19, 32

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 26

Chicago, R.I. & P.R. Co. v. Martin, 178 U.S. 245 (1900) 10

Clark v. Barnard, 108 U.S. 436 (1883) 13, 14, 15, 16, 19, 30

College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 7, 12, 27, 29, 32

Edelman v. Jordan, 415 U.S. 551 (1974) 9, 11, 18, 27

El Paso Natural Gas Company v. Neztsosie, 526 U.S. 473 (1999) 20

Ex Parte Young, 209 U.S. 123 (1908) 17

Ford Motor Co. v. Dept. of Treas. of Indiana, 323 U.S. 459 (1945) ..... *passim*

Gardner v. New Jersey, 329 U.S. 565 (1947) 13, 14, 15, 16, 19, 30

Gunter v. Atlantic Coast R. Co., 200 U.S. 273 (1906) 13, 16, 17, 18, 19, 30

Hans v. Louisiana, 134 U.S. 1 (1890) 7

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 8

TABLE OF AUTHORITIES – Continued

Page

Humphrey v. Peagues, 83 U.S. (16 Wall.) 244 (1872)...16, 17

In Re 995 Fifth Ave. Assoc., 963 F.2d 503 (2d Cir. 1992)..... 16

In Re Burke, 146 F.3d 1313 (11th Cir. 1998)..... 16

In Re Lazar, 237 F.3d 967 (9th Cir. 2001)..... 16

Johnson & Johnson v. Kaufman, 226 Ga. App. 77 (1997)..... 10

Johnson v. Fankell, 520 U.S. 911 (1997)..... 10

Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946)..... 29

Michigan v. Long, 463 U.S. 1032 (1983)..... 21

Missouri v. Fiske, 209 U.S. 18 (1933)..... 18

Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937)..... 11

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991)..... 19

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1985)..... 8, 11, 18, 22, 25, 26

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959)..... 16

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)..... 8

Stanley v. Schwalby, 162 U.S. 255 (1896)..... 31

Terral v. Burke Constr. Co., 257 U.S. 529 (1922)..... 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Shaw, 309 U.S. 495 (1940)..... 19

United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940)..... 18, 19

Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907)..... 23

Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)..... 23

Wisconsin v. Schacht, 524 U.S. 381 (1998)...4, 9, 23, 25, 26

STATUTES

2 Stat. 88 (1801)..... 21

18 Stat. 470 (1875)..... 21

26 Stat. 826 (1891)..... 21

38 Stat. 790 (1914)..... 21

38 Stat. 803 (1915)..... 21

39 Stat. 726 (1916)..... 21

43 Stat. 936 (1925)..... 21

102 Stat. 662 (1988)..... 21

Alaska Stat. § 44.23.020(3)(c)..... 28

28 U.S.C. § 1367(c)..... 24, 25

28 U.S.C. § 1441..... 21, 24

28 U.S.C. § 1446(b)..... 2

42 U.S.C. § 1983..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 5-6-34 10

O.C.G.A. § 5-6-35 10

O.C.G.A. § 9-12-40 24

O.C.G.A. § 45-15-3 28

CONSTITUTIONAL PROVISIONS

GA. CONST. Art. 1, § II, ¶ IV(e)(f)6, 27 ..... 6, 27

GA. CONST. Art. 5, § 3 ¶ IV 28

U.S. CONST. Amend XI ..... *passim*

STATEMENT

Paul Lapides, a professor at Kennesaw State University, filed the instant action in the Superior Court of Cobb County, Georgia. Lapides sought damages against the Board of Regents of the University System of Georgia, and three faculty members at Kennesaw State University (in their official and individual capacities), Edwin Rugg, Timothy Mescon and Teresa Covin (collectively, the Defendants). (J.A. 11). Shortly after filing the original complaint Lapides dismissed Mescon as a defendant and pursued his claims against the other defendants. (R. 1). Lapides claimed that Covin and Rugg caused defamatory material related to allegations of sexual harassment to be placed in his personnel file and disseminated to others. (J.A. 12-13).

Lapides maintained in his complaint that these actions resulted in "numerous violations of his due process rights" and violated his "constitutionally protected right to practice his profession." (J.A. 12). Lapides also claimed that he was subjected to a hostile work environment, intentional infliction of emotional distress and an invasion of privacy. (J.A. 15-16). All claims were generally asserted against all defendants. (J.A. 9-19). In addition, Lapides asserted his intent to amend his complaint to add claims of discrimination. (J.A. 17-18). Lapides sought in excess of $1,000,000.00 in compensatory damages, unspecified punitive damages, costs, and attorneys' fees but did not seek an injunction or declaratory judgment. (J.A. 17-18).

The Board of Regents and the employees answered in the Superior Court. The Board of Regents denied the bulk

of Lapides' factual contentions and raised the Eleventh Amendment to the United States Constitution, sovereign immunity, and failure to state a claim as defenses. (J.A. 20-34). Rugg, Mescon, and Covin filed a joint answer and raised the Eleventh Amendment, sovereign immunity, failure to state a claim, and qualified immunity as defenses. (J.A. 35-47). On the same day, the Defendants jointly removed the case to federal court. Although Lapides' complaint was ambiguous as to whether he stated a federal claim, the Defendants believed that the complaint could be construed as sufficient notice of a federal claim to trigger the thirty-day deadline for removal. 28 U.S.C. § 1446(b). Therefore, the Defendants assumed Lapides brought his constitutional claims under 42 U.S.C. § 1983 and asserted the statute and the anticipated discrimination claim as a basis for federal court jurisdiction. (J.A. 4). Lapides has never disputed that his constitutional claims are brought pursuant to 42 U.S.C. § 1983.

In federal court, the Board of Regents and the individuals filed a motion to dismiss all claims, or in the alternative, dismiss the federal claims and remand the state claims barred by the Eleventh Amendment. (J.A. 48; App. 14a-16a). In particular, Defendants asserted that: (1) the federal claims against the individuals in their individual capacities are barred by the doctrine of qualified immunity; (2) the federal claims against the Board of Regents and the named employees in their official capacities are barred by the Eleventh Amendment; (3) neither of these parties are considered "persons" under § 1983; and (4) the state law claims are barred by the Eleventh Amendment. (App. 10a-17a).

Lapides argued in response that the Board of Regents and the individuals in their official capacity (hereinafter the State) waived their Eleventh Amendment immunity.[1] (R. 6). Lapides also filed a motion to remand the entire case asserting that the State waived its right to remove the case by answering in state court and asserting its Eleventh Amendment immunity. (J.A. 51). The State responded and reasserted its position that the barred state law claims could be remanded back to state court but that the court should dismiss the federal claims on the three grounds previously asserted. (App. 9a).

In its ruling, the district court first determined that the individuals were entitled to qualified immunity on the § 1983 claims. (Pet. App. 25a). The district court's finding on the issue of qualified immunity was never appealed and is now final. (R. 45, 46). Next, the district court accepted Lapides' position and found that the State waived its Eleventh Amendment immunity. (Pet. App. 27a). The court concluded that the Board of Regents and the individual employees in their official capacities are liable to the extent Lapides can show "an unconstitutional policy or custom by the Board of Regents through Kennesaw State University." (*Id.*). Accordingly, the court denied the motion to dismiss the § 1983 claims against the Board of Regents and the individuals in their official capacity. (*Id.* at 28a).

---

[1] As discussed at Part A.4, *infra*, Lapides' current position is that the State only waives part of its immunity. Lapides argues that the State waives its "forum immunity" not to have the federal courts adjudicate claims against the State under state law. He concedes that the State did not waive its sovereign immunity to the constitutional claims. (Pet. Br. p. 31).

The State appealed the decision of the district court to the Eleventh Circuit Court of Appeals. (R. 23). At the Eleventh Circuit, Lapides once again asserted that the State waived its Eleventh Amendment immunity including the State's sovereign immunity. (Appellee Br. pp. 4-17). Lapides argued that "[t]he Actions of the State of Georgia in this case are unequivocal evidence of its intent to waive sovereign immunity and not to preserve it." (Appellee Br. p. 17). The Eleventh Circuit rejected Lapides' argument on three grounds.

First, the court found that the Georgia Attorney General did not have authority to waive the State's Eleventh Amendment immunity under *Ford Motor Co. v. Dept. of Treas. Of Indiana*, 323 U.S. 459 (1945). (Pet. App. 4a-8a). Second, the court relied on the statement in *Wisconsin v. Schacht*, 524 U.S. 381, 386 (1998), that the presence of claims barred by the Eleventh Amendment "does not destroy removal jurisdiction that would otherwise exist." (Pet. App. 10a). Finally, the court noted that the "present case did not find its way into our courts because of a state initiated action." (*Id.*). To the contrary, "Lapides filed suit and the state removed to theoretically take advantage of our superior knowledge of the federal question involved in the case." (*Id.* at 10a-11a).

The court therefore instructed the district court to hear the non-barred claims over which it has jurisdiction and to remand all barred claims to the state superior court for adjudication. (Pet. App. 11a). Lapides' petition for a writ of certiorari to this Court followed.

SUMMARY OF THE ARGUMENT

A. The State of Georgia joined in the removal of this action for the benefit of its employees so that the employees could take advantage of the expertise and precedent of the federal court and could have the right to direct appeal on the issue of qualified immunity. State employees should not be deprived of these benefits because their co-defendant (the State) cannot consent to removal without waiving its Constitutional right. Limiting the State's waiver to what Lapides and the United States call "forum immunity" – the immunity that a state retains when it waives its immunity only in its own courts – does not make this intrusion on the State's fundamental right any more defensible.

The State's act in removing this case does not amount to a waiver of its Eleventh Amendment immunity. A state's Eleventh Amendment immunity may not be waived except when stated in the most unequivocal and express terms by a state officer who has the authority to waive the state's immunity. Georgia's act in participating in the removal of this case does not amount to an unequivocal and express waiver of its immunity, and the Attorney General for the State of Georgia does not have the authority to waive Georgia's Eleventh Amendment immunity. In the case at bar, the State raised its Eleventh Amendment immunity in its answer and in its motion to dismiss, both filed the same day as the notice of removal. Georgia never expressed an intent to waive its immunity.

This is not a case where the State has voluntarily become a party to an action or has initiated an action. Lapides filed an action against the State and the act of

removal does not convert the State from a defendant to a plaintiff. Lapides commenced and continues to prosecute this action. Thus, the action against the State falls squarely within the protection of the Eleventh Amendment.

The costs of a "waiver-by-removal" rule far outweigh the one benefit. If the Court adopts this new rule, Georgia would instantaneously be at odds with its employees who understandably have a desire to take advantage of the federal court's expertise, precedent and procedure on issues such as qualified immunity. Such a rule would conflict with Georgia's right and intent to have state law questions decided only in the State's courts. The State would also be subject to game-playing and manipulation of claims and cases by plaintiffs seeking to block removal. The only benefit to be gained by adopting this new rule is that all claims might be heard in one forum. The cost for this convenience is too high.

B. Lastly, the Attorney General for the State of Georgia does not have authority to waive Georgia's immunity. The Georgia Constitution specifically reserves the State's Eleventh Amendment immunity. GA. CONST. Art. 1, §§ II, ¶ IV(e)(f). Nothing in the Georgia Constitution, statutes, or case law provide that the Attorney General for the State of Georgia has the authority to waive the State's Eleventh Amendment immunity. More specifically, he lacks the authority to waive either the State's entire sovereign immunity or the so-called "forum immunity" as described by Lapides and the United States. This Court has repeatedly rejected the theory that a sovereign's immunity can be waived through an executive officer's

litigation conduct where, as here, the sovereign's executive officer does not have specific authority to effectuate such a waiver.

In summary, the decision of the Eleventh Circuit should be affirmed because Georgia did not expressly and unequivocally waive its Eleventh Amendment immunity; Georgia did not affirmatively assert a claim; and the Attorney General for the State of Georgia does not have the authority to waive Georgia's Eleventh Amendment immunity.

ARGUMENT

THE STATE OF GEORGIA DID NOT WAIVE ITS ELEVENTH AMENDMENT IMMUNITY WHEN ITS COUNSEL AGREED TO REMOVE THIS ACTION TO FEDERAL COURT

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or any citizens or subjects of any foreign state.

U.S. CONST. Amend XI.

The bounds of the states' sovereign immunity are not limited, however, by the words of the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Hans v. Louisiana*, 134 U.S. 1 (1890). To the contrary, for over a century this Court has "grounded

[its] decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). As a result, although the states' immunity from suit has sometimes been referred to as Eleventh Amendment immunity, the *Alden* Court explained,

> [t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713.

"A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original). This immunity "largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

A state may, of course, waive its sovereign immunity. The Court will not find such a waiver, however, unless it

is "unequivocal" and "stated by the most express language" so as to "leave no room for any other reasonable construction," *Edelman v. Jordan*, 415 U.S. 551, 673 (1974); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and where the officer executing the waiver has express authority under the laws of the State to waive the State's immunity. *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1945). Both of these requirements fully apply to the waiver of the so-called "forum immunity" as described by Lapides and the United States – neither of these two requirements is met in the case at bar.

A. Removal of This Case Did Not Clearly and Unequivocally Express Georgia's Intent to Permit a Federal Court to Resolve the Claims Barred by the Eleventh Amendment.

1. The State of Georgia agreed to removal of this action for the benefit of the individual defendants.

At the heart of Lapides' argument are his dual contentions that (1) removal by a State is a "clear and manifest . . . expression of the State's willingness to submit itself to the judgment of the federal courts" (Pet. Br. p. 10), and (2) the State's action here represents an "abuse . . . in the exercise of [its] Eleventh Amendment immunity." (Pet. Br. p. 42). It is therefore important at the outset to explain why Georgia in this case (like Wisconsin in *Schacht*) found it necessary to remove a case to federal court and then assert its Eleventh Amendment immunity.

Lapides filed his case in the state court raising both federal and state claims against the State and individuals. The individual state employees wished to take advantage of the federal court's expertise and precedent on the issue of qualified immunity. Additionally, since Georgia does not provide a direct appeal in the event they were denied qualified immunity, they wished to take advantage of the right to an interlocutory appeal. O.C.G.A. § 5-6-34; 5-6-35; *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 80-82 (1997); cf. *Johnson v. Fankell*, 520 U.S. 911 (1997). Since the removal statute requires that all parties consent to the removal of an action, see, e.g., *Chicago, R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900), the State's employees would have been harmed had the State not agreed to remove the action.

The State's agreeing to remove this action, therefore, in no way suggests that the State intended to permit the federal court to resolve claims that would be barred by the Eleventh Amendment. Rather, by removing the case, the State (and the individual defendants) sought merely to accomplish the ordinary objective of removal – placing the case in front of the federal district court as though it had initially been filed there. And had the action initially been filed in federal court, the individual defendants would have benefited from the federal court's experience with qualified immunity issues and the right to an interlocutory appeal on that issue, while the State would have been able to assert its Eleventh Amendment immunity.

2. Georgia's action in removing this case did not constitute a clear and unequivocal waiver of its Eleventh Amendment immunity.

Georgia consented to have the federal court adjudicate the claims over which that court had subject matter jurisdiction, but Georgia specifically reserved all of its defenses in the removal and asserted its Eleventh Amendment immunity in its answer and its motion to dismiss filed at the same time as the removal. Such action does not amount to an intentional relinquishment of the State's Eleventh Amendment immunity.

This Court has consistently found that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . ." *Edelman v. Jordan*, 415 U.S. at 673. The Court "do[es] not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Thus, when Congress intends to abrogate the States' immunity it may do so only "by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Where a state intends to waive its immunity, the Court insists "that the State's consent be unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The Court's "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.*

The Court soundly rejected the doctrine of implied waiver in *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999):

> The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights. State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. And in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.

Id. at 682 (citations and internal quotation marks omitted).

Lapides and the United States refer to the act of removal as affirmative consent. However, they are improperly equating "agreement to remove" with "agreement to waive." An agreement to remove is simply an agreement to remove, no more and no less. A new "waiver-by-removal" rule is truly just another form of the constructive consent doctrine that was already rejected in *College Savings Bank*. Thus, since the State's action in removing this case does not express a clear and unequivocal intent to waive its immunity, no waiver can be found.

3. The Court has never found that a state waived its Eleventh Amendment immunity merely through a state's litigation conduct where the state did not affirmatively assert a claim.

Lapides maintains that a knowing and unequivocal consent may be unnecessary because the cases requiring such clear consent involve broad statutory waivers of immunity. (Pet. Br. p. 12). He asserts that *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273 (1906); and *Gardner v. New Jersey*, 329 U.S. 565 (1947) are more applicable because they involve particularized litigation conduct in specific cases. (Pet. Br. pp. 13, 16-26). To the contrary, none of the cases relied upon by Lapides and the United States involved a State's defensive litigation conduct.

More specifically, the cases relied upon by Lapides and the United States do not support their position because: (1) none of the actions involved a claim for damages against the State; (2) *Clark* and *Gardner* involved a State's entry into a case in an effort to recover a *res* from the court; (3) *Gunter* involved the court's enforcement of a restraining order which the State attempted to violate after 25 years of acquiescence; and (4) none of the more recent citations to these three cases expands the waiver doctrine to include a waiver in the context of the present case. Thus, it is apparent that the stringent consent standard discussed in Part A(2), *supra*, is more applicable to the case at bar. The three cases principally relied upon by Lapides will be addressed in turn.

In *Clark v. Barnard*, 108 U.S. 436 (1883), the State of Rhode Island intervened in an action in federal court in order to make a claim against a fund in the registry of the court. It was the "voluntary appearance of the state in intervening as a claimant of the fund" that formed the basis for the Court's finding of its limited jurisdiction over the State. *Id.* at 447. The *Clark* Court noted that the State had "made itself a party to the litigation," and stated that, based upon the State's entry into the case to make a claim on the fund held by the court, it had the authority to decide the "adverse rights" of the State "to the fund" it claimed. *Id.* at 448.

The Court's discussion of waiver of the Eleventh Amendment applied to the defense raised by Clark, the State treasurer, against being made a defendant prior to the State's intervention in the case. Lapides muddles the holding of the Court by failing to recognize that it was this subsequent intervention by the State that made it unnecessary for the Court to consider Clark's immunity defense. Further, even with the State's voluntary intervention, the Court never implied that it had authority to delve into the State's treasury in order to compensate others for alleged damages. The *Clark* holding is limited to the distribution of the funds deposited with the court.

Likewise, in *Gardner v. New Jersey*, 329 U.S. 565 (1947), the State initiated actions in state court to collect back taxes owed by a railroad. When the debtor railroad filed for bankruptcy, the State asserted a claim for the taxes that the state courts already ordered the debtor to pay. The railroad filed objections to State's proof of claim, and the bankruptcy court found that it had authority to determine the validity of the claims in the course of resolving

the objections. The State protested that this finding was a violation of its Eleventh Amendment rights.

The *Gardner* Court found "that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was **not** a suit against the state." *Id.* at 572 (emphasis added). The Court concluded that "the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought from the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*." *Id.* at 574.

In both *Clark* and *Gardner*, the State voluntarily entered the action seeking something from the debtor. Technically, the Eleventh Amendment was not even implicated since the actions were not "commenced or prosecuted **against**" the States. U.S. CONST. Amend. XI (emphasis added). In contrast, Lapides commenced an action against the State of Georgia, albeit in the state court, and he has continued to prosecute the action in federal court. The fact that the State removed the action to federal court does not transform the State from a defendant to a plaintiff. *Clark* and *Gardner* are therefore inapposite.

Even Lapides admits that "[w]hile a state's filing of proofs of claim in bankruptcy (see 11 U.S.C § 106 (b)) or in admiralty (see FRCP Supp. Rules B & C), raise similar issues of invoking federal court jurisdiction, the additional feature of a state asserting priority to a *res*, may

distinguish such cases." (Pet. Br. p. 33).[2] Although Lapides makes this concession, he attempts to bolster his position by stating that *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) broadens the rule of *Clark* beyond the bankruptcy application. (Pet. Br. p. 21). *Petty*, however, is no help to Lapides. Although the case involved a wrongful death claim for damages against the State, the plaintiff's ability to sue the State was derived from an express provision of an interstate compact providing that the State could sue and be sued for any matter arising under the compact. *Id.* at 280-282. A state legislature's decision to enter an interstate compact is plainly different from the removal of a particular action to federal court.

Finally, in *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273 (1906), the South Carolina legislature exempted a railroad from tax. When the State later changed the law to provide for taxation, the railroad filed an action in federal court seeking to enjoin the State from collecting taxes. *Id.* The Court ruled that the railroad could not be taxed and enjoined the collection of taxes. *Id.*; *Humphrey v. Peagues*, 83 U.S. (16 Wall.) 244 (1872). The State acquiesced and did not attempt to collect taxes again until approximately 25

[2] Respondents are not unfamiliar with the lower courts' expansion of *Gardner* in the bankruptcy context. *See In Re 995 Fifth Ave. Assoc.*, 963 F.2d 503 (2d Cir. 1992); *In Re Burke*, 146 F.3d 1313 (11th Cir. 1998); *In Re Lazar*, 237 F.3d 967 (9th Cir. 2001). We are, however, in agreement with Lapides that these issues need not be addressed at this time. (Pet. Br. p. 33). Should the Court choose to address those cases, however, it is clear that they cannot bear the broad weight placed upon them by the lower courts.

years later when the legislature passed an Act requiring the Attorney General to recover the back taxes. *Id.* at 279. Pursuant to this legislative mandate, the Attorney General attempted to collect the back taxes and interest by filing actions in the State's courts. The railroad sought and received injunctive relief pursuant to the prior court order. The Court found that the Eleventh Amendment did not restrict its authority to enforce its prior judgment. *Id.* at 292. Once again, this situation has no application to the case at bar. First, *Gunter* involved the State's compliance with court-ordered injunctive relief, not an action for damages against the State. *Gunter* may thus be limited by the Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) two years later finding that the Eleventh Amendment does not apply in actions for prospective injunctive relief against state officials.

Additionally, the *Gunter* Court's reference to the State's waiver of its immunity was primarily based on state legislative enactments and contemporaneous administrative interpretations of the attorney general's authority, as well as the State's long acquiescence to court-ordered injunctive relief without the State's questioning the Court's jurisdiction. *Id.*; *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459, 469 (1945). Neither of these factors exist here. The *Gunter* Court opinion does not hold or even imply that, where a state objects to its jurisdiction at the outset of the litigation, and when the attorney general is not authorized to waive the state's

immunity, it nonetheless waives its immunity from suit by its litigation conduct.[3]

Lapides also cites *Missouri v. Fiske*, 209 U.S. 18 (1933), to support his reading of *Gunter*. *Fiske*, however, supports the State's position more than it does Lapides'. In *Fiske*, the State intervened in an action and attempted to restrict the federal court's adjudication of a claim to an estate. The Court found that the actions of the State did not amount to sufficient conduct to cause a waiver of its immunity because the State entered into the proceeding to seek a limited ruling from the court. When Georgia entered the federal forum in this case, it asserted Eleventh Amendment immunity as to all claims and also sought dismissal on alternative grounds. If a state's voluntary entrance into an action as a party to receive a limited ruling does not amount to a waiver, a state's removal to a forum after it has already been sued so as to seek a limited ruling while asserting its Eleventh Amendment immunity, certainly should not amount to waiver.

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[3] It is difficult to gauge the efficacy of *Gunter* in light of the Court's subsequent decisions that allow the Eleventh Amendment to be raised for the first time on appeal. *See Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945); *Edelman v. Jordan*, 415 U.S. 651 (1974). The Court has even allowed the United States to assert its corollary immunity in a collateral attack on a court judgment entered without jurisdiction. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). Moreover, the decision in *Gunter* may be more a product of the struggle the Court was having in reconciling the Eleventh Amendment with the Supremacy Clause as described in this Court's opinion in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

Similarly, this Court has repeatedly found that where a sovereign seeks relief in the federal courts it does not waive its immunity from cross-claims and counterclaims. *United States v. Shaw*, 309 U.S. 495 (1940) (where government files a claim against an estate it does not subject itself to an affirmative cross-claim for damages); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940) (where sovereign filed a complaint, a mandatory counterclaim may be litigated only as to the recoupment of the government's claim); *see also Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). While these cases involve the federal government and Indian tribes, not states, they are persuasive authority as to the narrow limits of "waiver" through litigation conduct. *See California v. Deep Sea Research*, 523 U.S. 491, 506-507 (1998).

In summary, Lapides' argument that *Clark*, *Gunter*, and *Gardner* set the standard for waiver of the State's immunity through litigation conduct when the State is sued for money damages simply fails. The stringent standard established by more recent decisions of this Court should apply to the State's action in this case. The State did not choose to become a party to this action as it did in *Clark* and *Gardner*. Georgia did not acquiesce to a court order, nor is there legislative authorization as in *Gunter*. Lapides is pursuing damages against the State under state law – a situation that is not present in any of the cases he cites as support for his position.

4. Equity and practical considerations support the State's position.

A "waiver-by-removal" rule should not be embraced for many practical and equitable reasons. First, as noted in Section A(1), *supra*, such a rule would interfere with the longstanding right of defendants to have access to federal review of federal questions, thus putting the state at odds with its employees or other co-defendants. Second, such a rule would conflict with the state's right to have state law questions decided in the state's courts. Finally, it would lead to manipulation by plaintiffs by causing sham joinder of parties and claims. These costs far outweigh the sole benefit of having all claims heard in one forum and weigh heavily against a new waiver rule.

First, the adoption of a "waiver-by-removal" rule would place the states in an untenable position. States would be forced to choose between the right of their employees or other co-defendants to a more experienced forum with experience, precedent and the right to direct appeal on issues of qualified immunity, and the waiver of their immunity from federal courts interfering in the administration and enforcement of state law. Instantaneously, states would be in conflict with their employees or other co-defendants, who could benefit from the expertise of the federal court and from the right to direct appeal on the denial of qualified immunity.

When Congress created the removal procedure for federal question cases, Congress "expressed an unmistakable preference for a federal forum, at the behest of the defending party." *El Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999).[4] This preference should not be hindered by attaching an unintended consequence to the use of the procedural right, especially where, as here, there is relatively little harm to the plaintiff. Ever since the creation of concurrent jurisdiction over federal question cases, Congress has provided for the removal of those causes from the state to the federal court. *See* 2 Stat. 88 (1801); 18 Stat. 470 (1875); 26 Stat. 826 (1891); 39 Stat. 726 (1916); 43 Stat. 936 (1925); 28 U.S.C. § 1441. This fact speaks volumes as to the need for defendants to have access to lower federal courts to interpret federal questions.[5] Furthermore, the need for defendants to remove has increased over the years due to the steady decrease in the Court's automatic review of federal question cases from the state courts. *See* 38 Stat. 790 (1914); 38 Stat. 803 (1915); 39 Stat. 726 (1916); 43 Stat. 936 (1925); 102 Stat. 662

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[4] In another context, the Court has found that a defendant's right to remove amounts to a Constitutional right. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

[5] This Court noted in *Boys Markets Inc. v. Retail Clerk's Union*, 398 U.S. 235, 246, n.13 (1970), that, "[t]he legislative history of the federal question removal provision is meager, but it has been suggested that its purpose was the same as original federal question jurisdiction enacted at the same time in the Judiciary Act, of 1875, 18 Stat. 470, namely to protect federal rights, *see* H. Hart and H. Weshster, *The Federal Courts and the Federal System* 727-733 (1953), and to provide a forum that could more accurately interpret federal law, *see* Mishkin, *The Federal 'Question' in the District Courts*, 53 Col. L. Rev. 157, 159 (1953). . . . " The Court has also recognized the need for consistency in the interpretation of federal law when it stated, "it cannot be doubted that there is an important need for uniformity in federal law. . . . " *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

(1988). In an overwhelming majority of cases brought in state court, the only way that defendants will have an opportunity for federal review of federal constitutional questions is if they are able to remove a case to federal court. *See Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 246, n.13 (1970). Never before has the exercise of this right come at such a high cost nor should it now.

Secondly, states have a vested interest in having their own courts decide issues of state law. The position advocated by Lapides and the United States would run afoul of this Court's admonition that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Moreover, such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106. In this case, the result would be the federal district court construing the Georgia Tort Claims Act and potentially imposing sanctions against Georgia officials for violating Georgia tort law. This intrusion on state sovereignty is what Lapides argues should be exchanged for his convenience of litigating in a single forum. But the Court has already rejected the validity of exchanging "expediency and efficiency" for this intrusion into state sovereignty stating that to allow such an intrusion into state law "would emasculate the Eleventh Amendment." *Id.*

Finally, a "waiver-by-removal" rule would subject the State to manipulation by plaintiffs seeking to improperly block removal. Lapides decries "game-playing" by Georgia, although it is unclear what "game-playing"

would be avoided by the holding he urges.[6] What is clear, however, is that a ruling such as the one urged by Lapides is more likely to engender manipulation by the numerous plaintiffs seeking to raid the state treasury. Justice Kennedy cautioned that, "[I]f it were demonstrated that a federal rule finding waiver of the Eleventh Amendment when the State consents to removal would put States at some unfair tactical disadvantage, perhaps the waiver rule ought not to be embraced." *Wisconsin*, 524 U.S. at 397-398 (Kennedy, J. concurring). Such an "unfair tactical disadvantage" would result by the adoption of a "waiver-by-removal" rule.

In order to discourage removal, plaintiffs will be able to insert improper claims and parties along with their federal claims. This joinder device could easily be employed to force a state to litigate its federal claims in state court. The Court has long held that such sham joinder of parties in diversity cases would not defeat a defendant's right of removal. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-186 (1907). Yet, this is

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[6] Lapides suggests that allowing the State to remove a case only to allow it to dismiss all or some of the claims based upon the Eleventh Amendment is unfair. (Pet. Br. p. 40). First, it is important to note that Georgia in this case has always argued in the alternative that the barred state claims should be dismissed or remanded to the state court for adjudication. (App. 9a, 14a-16a). Secondly, the ruling of the Eleventh Circuit assured that there would be no inequity by ordering that all barred claims be remanded to the state court rather than dismissed outright. (App. to Pet. for Cert. 11a). Thus, Lapides is simply incorrect when he argues that the State's removal would "block any avenue of relief open to plaintiff." (Pet. Br. p. 42).

precisely what would occur should the Court find that a state waives its immunity by the removal of federal question cases.

Lapides claims that Georgia has gained an unfair advantage in its actions in this case. He cites to several cases that discuss potential manipulation by a state. (Pet. Br. pp. 40-41). These cases and criticisms are inapplicable to the case at bar. Based upon Lapides' apparent concessions regarding the State's retention of all but its "forum immunity," the only argument of possible harm or manipulation caused by removal is that a plaintiff might be forced to litigate his claims in two fora.[7]

A plaintiff has no right, however, to have all his claims heard in one forum. The Court and Congress have already provided that it is acceptable to bifurcate a plaintiff's claims. First, 28 U.S.C. § 1441(c) provides that when a federal question claim is removed along with an otherwise non-removable claim, "the district court may determine all issues therein or in its discretion, may remand all matters in which State law predominates." *See also* 28 U.S.C. § 1367(c) (authorizing federal courts to dismiss supplemental claims). While Congress did not provide a means for the state or anyone else to remove only those claims based on federal law, it did provide a vehicle for

[7] Lapides asserts that the state rules of civil procedure and preclusion require plaintiffs to assert their federal conditional claims in the same action as their tort claims. (Pet. Br. p. 42). A review of Georgia law shows that this will rarely be the case. O.C.G.A. § 9-12-40.

those claims based on state law to be returned to the state court.[8]

Moreover, in *Wisconsin v. Schacht*, 524 U.S. 381 (1998) the Court, "reject[ed] respondent's [Schacht's] argument" that the Court must be able to accept jurisdiction over the entire case in order for the removal to be valid. *Id.* at 391. In doing so, the Court also rejected the principle that there was some right of plaintiffs to have all their claims heard in one forum. *Id.*[9] *See also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 (1984) ("applying the Eleventh Amendment to pendent claims [may] result [ ] in federal claims being brought in state court, or in bifurcation of claims.").

The Court has also recognized that bifurcation of claims is not an uncommon result in these types of cases thereby acknowledging that there is no right for plaintiffs to have all claims heard in one forum. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1985).

[8] Lapides appears to argue (Pet. Br. p. 32) that once a state removes a case to federal court, the court loses its authority to dismiss supplemental claims under § 1367(c). That contention is untenable, as even the United States recognizes. (U.S. Br. p. 24).

[9] Georgia is not unmindful of the fact the State in *Schacht* did not raise its Eleventh Amendment immunity until after the removal of the case. Lapides may argue that this distinction has some value. What is important to note, however, is that Lapides and his amici cite authorities that hold that the State should not be allowed to play games by raising the Eleventh Amendment at a late stage of the proceeding. (Pet. Br. pp. 41-42; Ceres Marine Brief pp. 18-22); *see also Wisconsin v. Schacht*, 524 U.S. at 397-398 (Kennedy, J., concurring). Such authorities do not support a state being penalized for asserting its immunity up front, thereby leaving no room to question its intent.

The removal statute, *Schacht* and *Pennhurst* allow for cases to be heard in two fora. Clearly, plaintiffs have no right to have their claims adjudicated in one forum. Litigating in one forum is nothing more than a convenience. Georgia should not be required to forfeit its Constitutional right so plaintiffs may more conveniently proceed once they have coerced its involvement in litigation.

In the end, plaintiffs who sue a State and States being sued are both faced with a forum choice and a consequence thereof. As masters of their own complaints, plaintiffs have the opportunity to block removal in any case by simply choosing not to pursue federal claims in state court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

B. The Attorney General for the State of Georgia Does Not Have Authority to Waive the State's Eleventh Amendment Immunity.

In *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1945), the Court found that prior to determining if a state waives its Eleventh Amendment immunity by its litigation conduct, it is first necessary to determine if "it is within the power of the administrative and executive officers of [the State] to waive the State's immunity." *Id.* at 467-68. More specifically, to determine if state officers are authorized to waive the state's immunity by their litigation conduct, "this court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions." *Id.* Where the state's Constitution provides for bringing suit against the state only in state court, the statutory power of the state's attorney

general, "to appear and defend actions brought against the state or its officials [cannot] be deemed to confer on that officer power to consent to suit against the state. . . ." *Id.* at 468. The *Ford Motor Co.* Court reviewed Indiana's Constitution and statutes, and determined that Indiana's Attorney General was not authorized to waive the State's immunity. *Id.* at 467.[10]

In this case, the Eleventh Circuit correctly applied *Ford Motor Co.*, interpreted Georgia law and concluded that Georgia's Attorney General does not have the authority to waive Georgia's Eleventh Amendment immunity. (Pet. App. 6a). See GA. CONST. Art. I, § II, Para. IV(e),(f), reprinted in 2 Ga. Code Ann. (1996 Supp.) ("(e) . . . The sovereign immunity of the state and its departments and agencies can **only** be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. . . . (f) **No** waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments,

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[10] In *Ford Motor Co.* the State conceded that it had waived its immunity by its litigation conduct if its Attorney General had authority to waive the State's immunity. It is unclear why the State conceded this point. One could speculate that, since the case was litigated prior to the rejection of the implied waiver doctrine, *College Savings Bank v. Fla. Prepaid Postsecondary Educ.*, 527 U.S. 666 (1999) and prior to the Court's allowing the immunity defense to be raised for the first time on appeal, *Edelman v. Jordan*, 415 U.S. 551 (1974), the State simply failed to raise these arguments.

agencies, officers, or employees by the United States Constitution." (emphasis added).[11]

In order for a state legislature to provide for its attorney general to waive its immunity from suit, it would need to do so expressly.[12] If a state legislature cannot, except by express terms, waive the state's Eleventh Amendment immunity, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), it stands to reason that, when empowering an executive official to waive the state's immunity, such a declaration must be just as clear.

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[11] Georgia, like most states creates an Office of the Attorney General to represent the state in matters of civil and criminal litigation:

> "The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law."

GA. CONST. Art. 5, § 3 ¶ IV. (App. 2A-4A). These duties are enumerated further in O.C.G.A. § 45-15-3 and are limited to representation and advice for the state, its agencies and employees. (App. 4a). This is not dissimilar to the duties assigned to state attorneys general across the country. (State statutes attached as App. 18a-86a).

[12] In fact, at least one state, Alaska, has provided its attorney general with authority to waive its Eleventh Amendment immunity. The Alaska code provides, "Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under *AS 09.17.080*, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States." Alaska Stat. § 44.23.020(3)(c), (App. 19a-20a).

See College Savings Bank, 572 U.S. at 676; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579 (1946); *Ford Motor Co.*, 323 U.S. at 465. State legislatures may have the power to waive the state's Eleventh Amendment immunity and may be able to vest that authority in the attorney general. But Georgia has not made a clear declaration that its Attorney General has such authority.

The United States asserts that "*Ford* is difficult to reconcile in principle with other cases that treat a State's litigation conduct in federal court as a waiver" without consideration of the authority of the State's attorney to waive. (U.S. Br. p. 7). It urges the Court to consider overruling *Ford Motor Co.*, or at least to limit it to only those situations where the state is brought into federal court through a coercive process and then fails to raise its immunity until a late stage in the proceeding. (U.S. Br. pp. 2-26). Lapides, although less direct, also suggests that *Ford Motor Co.* is "unreliable." (Pet. Br. p. 35). *Id.* To the contrary, the *Ford Motor Co.* rule is sound and should be preserved.

The *Ford Motor Co.* rule preserves the core of the Eleventh Amendment by reserving to the states the right to determine the authority of their officers and the power to limit where they will be sued. The suit involved a claim against the state for back taxes. In finding against a waiver, the Court noted that while a state may authorize "a suit against itself to do justice in its own courts to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts. . . . " *Ford Motor Co.*, 323 U.S. at 465. The Court cautioned against "judicial interference in

the vital field of financial administration [absent] a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation. . . . " *Id.* Application of a "waiver-by-removal" rule ignores the intentions of the states as to the power of their own officers, and results in the federal court's adjudication of state law claims against the wishes of the States.

Additionally, *Ford Motor Co.* is consistent with a properly limited interpretation of *Clark*, *Gunter* and *Gardner*. As noted above, *Clark* and *Gardner* do not involve a true waiver of sovereign immunity; the States did not defend themselves from claims asserted by others, but rather the States asserted claims of their own. And *Ford* itself found that *Gunter* is distinguishable due to the state's distinct statutory authorizations and administrative interpretations. *Id.* at 464. *Gunter* is further distinguishable as noted above due to the injunctive nature of the suit and the extended acquiescence of the state to the court order.

Should the Court overrule its holding in *Ford Motor Co.*, two things are likely to occur. First, the Court will be repeatedly faced with deciding what specific conduct by the states' attorneys general amounts to a waiver of the Eleventh Amendment. Second, states will be forced to limit the litigation conduct of their lawyers. Most states generally authorize their attorneys general to defend the state in all matters of litigation. (See state statutes in App. 18a-86a). If *Ford Motor Co.* is overruled, states and their attorneys general will be forced to guess as to what conduct may be deemed a waiver in order to avoid accidentally waiving the Eleventh Amendment. If the states

guess wrong, the Eleventh Amendment would be waived despite a clear contrary intent. This Court has never adopted a rule that would allow for the accidental waiver of a constitutional right.

Finally, a determination that *Ford Motor Co.* does not apply to the case at bar would unjustifiably treat state legislatures with less respect than Congress with regard to the authority they grant to executive officers to waive sovereign immunity. It is the longstanding precedent of this Court that the Attorney General and other executive officers of the federal government do not have authority to waive the federal government's immunity:

> It is a fundamental principle . . . , that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress. . . . Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.

Stanley v. Schwalby, 162 U.S. 255, 270 (1896). If the federal government cannot be subject to liability as a result of the actions or authority of its executive officers, the states should be afforded the same protection.

The United States suggests that the authority of the United States Attorney General and other officers of the federal executive branch of government to waive has little bearing on the authority of the attorneys general of the various states. (U.S. Br. pp. 18-19 n.6). According to the United States, the federal Constitution vests the

exclusive authority to waive the United States' sovereign immunity in the legislative branch. By contrast, it argues that the federal Constitution does not provide a similar basis for limiting the state's waiver authority to the state legislature. *Id.* This attempt by the United States to narrow the scope of the States' immunity while shielding itself from such narrowing must fail. The Court has already established that when reviewing issues of a state's waiver of immunity it is proper to use the standard of the federal government's immunity as an example. *College Savings Bank*, 527 U.S. at 682; *see also California v. Deep Sea Research*, 523 U.S. 491 (1998) ("this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government"). If it is appropriate to look to the United States Constitution to determine what branch of government is authorized to waive the United States' immunity, it is equally appropriate to look to the constitutions of the various states to determine what branch of government is authorized to waive the states' immunity.

CONCLUSION

For the above and foregoing reasons, the State of Georgia respectfully urges this Court to affirm the decision of the Eleventh Circuit Court of Appeals and to find that a state does not waive its Eleventh Amendment immunity by removing a case to federal court.

Respectfully submitted,

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28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgement it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject

matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

GA. CONST. Art. 1, § 2, Para. IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.

(a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide.

(b) The General Assembly may also provide by law for the processing and disposition of claims against the state which do not exceed such maximum amount as provided therein.

(c) The state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies.

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and

may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgement shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

(f) No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided by the United States Constitution.

GA. CONST. Art. 5, § 3, Para. III. Powers, duties, compensation, and allowances of other executive officers.

Except as otherwise provided in this Constitution, the General Assembly shall prescribe the powers, duties, compensation, and allowances of the above executive officers and provide assistance and expenses necessary for the operation of the department of each.

Para. IV. Attorney General; duties.

The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.

O.C.G.A. § 45-15-3. Duties generally.

It is the duty of the Attorney General:

(1) When required to do so by the Governor, to give his opinion in writing, or otherwise, on any question of law connected with the interest of the state or with the duties of any of the departments;

(2) When he deems it advisable, to prepare all contracts and writings in relation to any matter in which the state is interested;

(3) When required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil actions to which the state is a party;

(4) To act as the legal advisor of the executive branches;

(5) To represent the state in all capitol felony actions before the Supreme Court;

(6) To represent the state in all civil actions tried in any court; and

(7) To perform such other services as shall be required of him by law.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management and Entrepreneurship at Kennesaw State University, Defendants.	*	CIVIL ACTION NO. 1:00-CV-0953-TWT

PORTIONS OF: DEFENDANT BOARD OF REGENTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION

Plaintiff argues that Defendants' removal of this case to federal court was defective and that the entire case

should be remanded to state court. All of Plaintiff's arguments are easily answered, however, with the result that Defendants are entitled to have Plaintiff's federal claims heard by this federal court. As to Plaintiff's state tort claims, these claims must either be dismissed or else severed and remanded to state court. (*See* Defendants' Brief In Support Of Their Motion To Dismiss, Part III, p.7).

II. DEFENDANTS HAVE NOT WAIVED THEIR RIGHT TO REMOVE.

Plaintiff argues that the inclusion of Defendants' Eleventh Amendment defense in their Answers shows that they "unequivocally reject[ed] their right to remove to federal court." (Pl. Br. p. 6) Plaintiff cites no authority for this position, however, and it is more logical to infer the contrary conclusion – that the inclusion of Defendants' Eleventh Amendment defense in their state court answers shows that Defendants fully intended to exercise their right to remove to federal court, where the defense would be relevant. Further, as will be shown below, the Eleventh Amendment defense does not apply to the § 1983 claims against the individual Defendants in their individual capacities, nor to the Title VII claim. These claims are not barred by the Eleventh Amendment, and Defendants are entitled to have them heard by this court.

PLAINTIFF IS INCORRECT IN STATING THAT ALL HIS CLAIMS ARE BARRED FROM CONSIDERATION BY THE FEDERAL COURT; THUS, ALL NON-BARRED CLAIMS CAN BE HEARD.

The State Defendants Are Entitled To Have the § 1983 Claims and the Title VII Claims Heard In Federal Court.

Therefore, even if the Title VII claim was the only basis for removal, which is not the case, the Plaintiff's statement that the Title VII claims "will be added to the within and foregoing complaint" clearly allowed Defendant to "intelligently ascertain the removability of the action." *See also Perimeter Lighting Inc. v. Karlton*, 456 F.Supp. 355 (N.D. Ga. 1978); Therefore, it necessarily follows that Defendant properly moved to dismiss all Title VII claims since said claims comprised *one* (1) basis for removal jurisdiction.

B. The Presence Of A Claim That The Eleventh Amendment May Bar Does Not Destroy Removal Jurisdiction That Would Otherwise Exist. *Wisconsin Department of Corrections v. Schacht*, ___ U.S. ___, 118 S.Ct. 2047, 141 L.Ed. 2d 364 (1998).

The United States Supreme Court has addressed almost the identical issue that is before this court and determined that the federal court has jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment. In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed. 2d 364 (1998), the Court stated the issue and holding as follows:

> [T]he question before us is whether defendants in a case filed in a state court, with claims "arising under" federal law, can remove that case to federal court-where some claims, made against a State, are subject to an Eleventh Amendment bar. We conclude that the defendants can remove the case to a federal court and that the court can decide the nonbarred claims.

Id. at 383. In *Schacht*, the Seventh Circuit had found that the presence of even one claim barred by the Eleventh Amendment deprived the federal courts of removal jurisdiction over the entire case. *Id.* at 385. The Supreme Court vacated this decision, finding that "the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist." *Id.* at 386.

Plaintiff cites no authority for his position that raising the defense as to some claims prior to removal destroys Defendants' right to remove under Wisconsin. Thus, Plaintiff's argument stated in Part II of his brief is simply a restatement of his "waiver" argument from Part I, and as shown above, that argument is without merit.

III. CONCLUSION

For the foregoing reasons, Defendant, Board of Regents of the University System of Georgia, respectfully requests that this Court deny Plaintiff's Motion to Remand the federal claims and Plaintiff's claim for costs and attorney's fees. Defendant does not object to this court remanding the tort claims brought pursuant to the Georgia Tort Claims Act.

Respectfully submitted,

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University,

Defendants.

CIVIL ACTION
FILE NO. _____

PORTIONS OF: DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW Defendants Board of Regents of the University System of Georgia, Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin, a/k/a Teresa Joyce and within the time permitted by law, make and file this Brief in Support of their Motion to Dismiss as follows:

STATEMENT OF THE CASE

The Plaintiff in this case has filed this action against Defendants alleging unlawful discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), *et seq.*) and that Defendants violated his right to Due Process pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has brought pendent tort claims of libel and slander under the Georgia Tort Claims Act.

ARGUMENT AND CITATION OF AUTHORITY

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THE PLAINTIFF'S COMPLAINT BECAUSE PLAINTIFF HAS FAILED TO MEET THE JURISDICTIONAL PREREQUISITE OF FILING WITHIN NINETY DAYS OF HIS RECEIPT OF A NOTICE OF RIGHT TO SUE LETTER FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

II. THE FEDERAL CLAIMS AGAINST THE BOARD OF REGENTS AND THE OTHER DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY THE ELEVENTH AMENDMENT.

It is long established that the Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984). The United States

Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)) (*Pennhurst II*).

The State of Georgia has not consented to be sued under 42 U.S.C. § 1983. In order to evidence such consent, there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). The Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. 1, 2, Para. 9(f), reprinted in 2 Ga. Code Ann. (1996 Supp.). Therefore, the State of Georgia has not waived the immunity provided it and its officials under the Eleventh Amendment.

The Eleventh Amendment is an absolute bar to damage actions against a State and its officers, acting in their official capacities, in federal court under 42 U.S.C. §1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The United States Supreme Court has determined that Congress did not intend for § 1983 to disturb the immunity to States provided by the Eleventh Amendment and alter the federal-state balance. *Will*, 491 U.S. at 65 (citing *Quern v. Jordan*, 440 U.S. 332 (1979)). The statutory language of 42 U.S.C. §§ 1983 and 1985 proscribes certain actions by a "person" or "persons" which violate the

rights of others. The Supreme Court has ruled that "person" in this context is to be given its ordinary meaning, and that, more specifically, "a State is not a person within the meaning of § 1983." *Will*, 491 U.S. at 65. A "State" includes State agencies and local government entities that are considered "arms of the State." *Id.* at 70. *See Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 276 (1977). It also includes State officers and employees sued under § 1983 in their official capacities, since such an action "is no different from a suit against the State itsself." *Will*, 491 U.S. at 71; *Carr v. City of Florence*, 916 F.2d 1521, 1525 (11th Cir. 1990). The ruling is consistent with the long-standing holdings of the Supreme Court that the Eleventh Amendment bars suits by private parties in federal court against a state, its agencies or employees sued in their official capacities "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See Papasan v. Allain*, 478 U.S. 265 (1986); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

In this case, the Plaintiff is suing the Board of Regents, and Edwin Rugg, Timothy Mescon, and Teresa Covin, in their official capacities, for damages. The Board of Regents is an agency of the State. Pursuant to the Eleventh Amendment, any claims against Board of Regents and the other Defendants, in their official capacities, are barred and the claims must be dismissed as a matter of law.

III. THE TORT CLAIMS AGAINST THE STATE EMPLOYEES AND THE BOARD OF REGENTS MUST ALSO BE DISMISSED OR SEVERED AND REMANDED TO STATE COURT, AS THE STATE HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT.

As stated previously, the Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984); *DeKalb County School District v. Schrenko*, 109 F.3d 680, 687 (11th Cir. 1997); *Silver v. Baggiano*, 804 F.2d 1211, 1213-14 (11th Cir. 1986). The Eleventh Amendment provides: "The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." United States Constitution, Amendment XI. The United States Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)) (*Pennhurst II*).

The State of Georgia has not consented to be sued in tort in federal court. Rather, the General Assembly of the State of Georgia expressly preserved the State's Eleventh

Amendment immunity when it enacted the Georgia Tort Claims Act ("GTCA"): "The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States." O.C.G.A. § 50-21-23(b). In addition, the Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Georgia Constitution, Article I, Section II, Paragraph IX(f). *See also, Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 465-66 (1945); and *Henderson v. Carter*, 229 Ga. 876 (1972). Therefore, the State of Georgia has not waived the immunity provided it and its officials under the Eleventh Amendment.

It is a long-standing holding of the United States Supreme Court that the Eleventh Amendment bars suits by private parties in federal court against a state, its agencies or employees sued in their official capacities "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See Papasan v. Allain*, 478 U.S. 265 (1986); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Fincher v. Florida Dept. of Labor & Employment Sec. Unemployment Appeals Comm'n*, 798 F.2d 1371, 1372 (11th Cir. 1986), *cert denied*, 479 U.S. 1072 (1987) (§ 1985); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985) (§ 1983); *Fouche v. Jekyll Island State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983) (§ 1983). Furthermore, a claim

for damages is a claim for retrospective relief which is barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 667-68.

There are only two ways in which a state's Eleventh Amendment immunity may be abrogated: (1) Congress may waive a state's immunity by explicit Congressional enactment; or (2) a state may itself waive its Eleventh Amendment immunity and consent to be sued in Federal Court. *Gamble v. Florida Department of Health and Rehabilitation Servs.*, 779 F.2d 1509, 1512 (11th Cir. 1986). With regard to the tort claims in the present case, Congress has not waived the State's immunity from suit in federal court nor has the State by its own actions waived that immunity. A waiver of immunity should be found only if there is an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1984). The State of Georgia has not only given no indication that the State intends to consent to federal jurisdiction, but rather, the State of Georgia has expressly preserved its Eleventh Amendment immunity, as noted above.

The Board of Regents is a state agency, and its employees are state employees, with the result that they are not subject to the jurisdiction of this Court in connection with the claims brought against them under the Georgia Tort Claims Act. Therefore, the Plaintiff's tort claims in this case should either be dismissed pursuant to the Eleventh Amendment for lack of federal jurisdiction, or severed and remanded to the State Court of Cobb County.

IV. THE 42 U.S.C. § 1983 CLAIMS AGAINST EDWIN RUGG, TIMOTHY MESCON AND TERESA COVIN ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY AND JUDGMENT SHOULD BE ENTERED ON DEFENDANTS' BEHALF AS A MATTER OF LAW.

V. 42 U.S.C. § 1983 WILL NOT SUPPORT A CLAIM UNDER A VICARIOUS LIABILITY THEORY.

VI. PLAINTIFF HAS NOT STATED A CLAIM FOR A VIOLATION OF HIS RIGHT TO DUE PROCESS.

Respectfully Submitted,

State Constitution and Statutory Provisions Relating to the Creation of and Duties for the States' Attorneys General

Alabama

Constitution:
ALA. CONST. sec. 112. Composition; officers enumerated.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Code:
Ala. Code sec. 36-15-1 (in relevant part). Duties generally.

(2) He or she shall attend, on the part of the state, to all criminal cases pending in the Supreme Court or Court of Criminal Appeals, and to all civil actions in which the state is a party in the Supreme Court or Court of Civil Appeals. He or she shall also attend to all cases other than criminal that may be pending in the courts of this state, in which the state may be in any manner concerned, and shall appear in the courts of other states or of the United States, in any case in which the state may be interested in the result.

The duties imposed by this section upon the Attorney General and his or her assistants shall be performed by the Attorney General personally or by his or her assistants under his or her supervision, direction, and control.

Any statute to the contrary notwithstanding, no attorney shall represent the State of Alabama, or any agency,

department, or instrumentality of the state in any litigation in any court or tribunal unless the attorney has been appointed as a deputy attorney general or assistant attorney general.

shall be paid by the state in the same manner as is now or hereafter may be provided for printing and

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Alaska

Constitution:
ALASKA CONST. art. 3, sec. 22

The Department of Law is part of the Executive Branch of the Alaska State Government. The Attorney General is appointed by the Governor of Alaska and serves as the legal advisor for the Governor and other state officers. The duties and powers of the Attorney General are found AS 44.23.020.

Code:
Alaska State sec. 44.23.020. (in relevant part). Duties; and powers; waiver of immunity.

(1) defend the Constitution of the State of Alaska and the Constitution of the United States of America;

(2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) represent the state in all civil actions in which the state is a party;

(c) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or

in any case in which the state seeks to allocate fault to the federal government or a federal employee under *AS 09.17.080* , waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

Arizona

Constitution:
ARIZ. CONST. art. 5, sec. 1. Executive department; state officers; terms; election; residence and office at seat of government; duties. (Version amended by 1992 Proposition 100)

A. The executive department shall consist of the governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970.

B. The person having the highest number of the votes cast for the office voted for shall be elected, but if two or more persons have an equal and the highest number of votes for the office, the two houses of the legislature at its next regular session shall elect forthwith, by joint ballot, one of such persons for said office.

C. The officers of the executive department during their terms of office shall reside at the seat of government where they shall keep their offices and the public records,

books, and papers. They shall perform such duties as are prescribed by the constitution and as may be provided by law.

Code:
Ariz. Rev. Stat. sec. 41-192 to 196. (in relevant part) Powers and duties of attorney general; restrictions on state agencies as to legal counsel; exceptions.

4. Represent school districts and governing boards of school districts in any lawsuit involving a conflict of interest with other county offices.

5. Represent political subdivisions, school districts and municipalities in suits to enforce state or federal statutes pertaining to antitrust, restraint of trade or price-fixing activities or conspiracies, provided that the attorney general shall notify in writing such political subdivisions, school districts and municipalities of the attorney general's intention to bring any such action on its behalf. At any time within thirty days after such notification, such political subdivisions, school districts and municipalities may, by formal resolution of its governing body, withdraw the authority of the attorney general to bring the intended action on its behalf.

4. Compromise or settle any action or claim by or against this state or any department, board or agency thereof. Where such compromise or settlement involves a particular department, board or agency of this state, the compromise or settlement shall be first approved by such department, board or agency. Where no department or agency is named or otherwise materially involved, the approval of the governor shall be first obtained.

D. The powers and duties of a bureau, subdivision or unit shall be limited to those assigned by law to the department.

Ariz. Rev. Stat. sec. 41-193. (in relevant part) Department of law; composition; powers and duties.

A. The department of law shall be composed of the attorney general and the subdivisions of the department created as provided in this article. Unless otherwise provided by law the department shall:

1. Prosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party.

2. At the direction of the governor or when deemed necessary by the attorney general, prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest.

3. Represent the state in any action in a federal court, the cost thereof and the expenses of the attorney general incurred therein to be a charge against the state.

8. Perform other duties prescribed by law.

Arkansas

Constitution:
ARK. CONST. art. 6, sec. 1. Executive officers.

The executive department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General, all

of whom shall keep their offices in person at the seat of government and hold their offices for the term of two years and until their successors are elected and qualified, and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands. [As amended by Const. Amend. 6, 1.]

Code:
Ark. Code Ann. sec. 25-16-702 (in relevant part) Representation of state agencies and officers generally – Employment of outside counsel

(a) The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.

(e) The Attorney General shall have authority to initiate civil lawsuits under all state and federal environmental protection statutes.

Ark. Code Ann. sec. 25-16-703 (in relevant part) Representation of state interests in federal courts

(a) The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved.

Representation of state interests in Supreme Court – Writs of quo warranto

(a) The Attorney General shall attend the several sittings of the Supreme Court and shall maintain and defend the interests of the state in all matters before that tribunal.

(d) The Attorney General is given authority, in cases where he deems it for the best interest of the state to do so, to make any compromises of delinquent taxes or moneys, as herein described, as in his judgment shall secure for the state the most advantageous settlement.

Ark. Code Ann. sec. 25-16-709 (in relevant part). Suits against officers indebted to state

(a) The Attorney General is authorized and empowered, and it is made his duty, to institute and prosecute all suits in behalf of the state against all officers of the state who are indebted to the state by reason of any moneys collected or received and not accounted for according to law.

California

Constitution:
CAL. CONST. art. 5, sec. 11

The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor. No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than 2 terms.

CAL. CONST. art. 5, sec. 13

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the

State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Colorado

Constitution:
COLO. CONST. art. 4, sec. 1. Officers-terms of office.

(1) The executive department shall include the governor, lieutenant governor, secretary of state, state treasurer, and attorney general, each of whom shall hold his office for the term of four years, commencing on the second Tuesday of January in the year 1967, and each fourth year thereafter. They shall perform such duties as are prescribed by this constitution or by law.

(2) In order to broaden the opportunities for public service and to guard against excessive concentrations of power, no governor, lieutenant governor, secretary of state, state treasurer, or attorney general shall serve more than two consecutive terms in such office. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person who succeeds to the office of governor or is appointed or elected to fill a vacancy in one of the other offices named in this section, and who serves at least one-half of a term of office, shall be considered to have served a term in that office for purposes of this subsection (2). Terms are considered consecutive unless they are at least four years apart.

Code:
Colo. Rev. Stat. sec. 24-31-101 (in relevant part). Powers and duties of attorney general.

(1) (a) The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch. He shall attend in person at the seat of government during the session of the general assembly and term of the supreme court and shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.

Connecticut

Constitution:
The Connecticut Attorney General was officially established in 1897.

Code:
Conn. Gen. Stat. sec. 3-125 (in relevant part).

The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters, and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the state House of Representatives and the state Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction.

Delaware

Constitution:
DEL. CONST. art. 3, sec. 21. Election and term of office for certain state officers.

The terms of the Office of the Attorney General, the Insurance Commissioner, the Auditor of Accounts and the State Treasurer shall be 4 years. These officers shall be chosen by the qualified electors of the State at general elections, and be commissioned by the Governor.

Code:
Del. Code Ann. tit. 29, sec. 2504 (in relevant part).

(2) Notwithstanding any other laws, to provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties and to publish or cause to be published such opinions in book form every 2 years.

(3) Notwithstanding any other laws, to represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government;

District of Columbia

D.C. Code Ann. sec. 404. Establishment of the Office of Attorney General.

(a) (1) There is established within the State of New Columbia government an Office of the Attorney General for the State of New Columbia headed by an Attorney General

(2) The Attorney General shall be appointed by the Governor with the advice and consent of the House of Delegates. The Attorney General shall serve at the pleasure of the Governor for a term of 4 years coterminous with the term of the office of the Governor as set by section 401. At the expiration of the term of office of the Attorney General, the Governor may appoint an Acting Attorney General to serve for no longer than 120 days. If the Governor fails to submit a nomination for Attorney General within 60 days of the expiration of the prior Attorney General's term of office, the Governor shall be deemed to have submitted the nomination of the Acting Attorney General to the House of Delegates for appointment pursuant to this subsection.

(3) A vacancy in the office of the Attorney General shall be filled in the same manner in which the original appointment is made. Any person so appointed to fill such a vacancy shall serve only for the remainder of the unexpired term of his or her predecessor

(4) No person may be nominated as Attorney General of the State of New Columbia unless he or she:

(A) Is a citizen of the United States;

(B) Is an active member of the unified bar created pursuant to the rules of the State of New Columbia Court of Appeals and, for the five years immediately preceding nomination, has been engaged in the active practice of

law in the State of New Columbia, has been on the faculty of a law school in the State of New Columbia, or has been employed as a lawyer by the United States or the State of New Columbia government; and

(C) Is a bona fide resident of the State of New Columbia and has maintained an actual place of abode in the State of New Columbia for at least ninety days immediately prior to nomination, and shall retain such residency as long as he or she serves as such Attorney General of the State of New Columbia.

(5) The Attorney General for the State of New Columbia shall be the chief legal officer for the State of New Columbia and have charge of all law business of the State of New Columbia. In the performance of such duties he or she shall:

(A) Have charge of the prosecution of all violations of the laws of the State of New Columbia;

(B) Have charge and conduct of all civil actions, suits or proceedings instituted by and against the State of New Columbia or its agencies or entities (including the independent agencies upon their request), or in which the State of New Columbia is concerned, including all actions in which the constitutionality or validity of the laws of the State of New Columbia are challenged;

(C) Render written legal opinions and advice to the Governor, the House of Delegates, and the heads of agencies and entities of the State of New Columbia government (including the independent agencies upon their request), which opinions, in the absence of specific action by the Governor or act of the House of Delegates to the

contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all State of New Columbia executive branch officers and employees in the performance of their official duties;

(D) Render, upon request, written legal opinions and advice on matters pertaining to the State of New Columbia to the President and Congress of the United States;

(E) Make recommendations to the Governor with respect to the pardon or the commutation of the sentences of persons convicted of crimes against the State of New Columbia;

(F) Develop criminal justice and law enforcement policies and assist the Governor, as directed, in the implementation of these policies;

(G) Perform all functions granted to or vested in the Corporation Counsel of the District of Columbia by law prior to the effective date of this constitution;

(H) Have the authority to appoint special counsel for a particular purpose or designated proceeding and to determine the compensation, powers, duties, and the length and manner of service of such special counsel; and

(I) Perform such other functions that the Governor may from time to time delegate to him or her.

(b) All prisoners convicted in a State of New Columbia court for any offense, including violations of municipal regulations and ordinances, shall be committed for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the State of New Columbia or his or her authorized representative, who shall designate the places

of confinements where the sentences of all such persons shall be served.

(c) The Attorney General for the State of New Columbia shall appoint a Marshal of the State of New Columbia who will assist the courts of the State of New Columbia and whose duties shall be as more fully prescribed by the House of Delegates

Code:
D.C. Code Ann. sec. 1-301.111 (in relevant part). Duties of Corporation Counsel [Formerly § 1-361]

The Corporation Counsel shall be under the direction of the Mayor, and have charge and conduct of all law business of the said District, and all suits instituted by and against the government thereof.

Florida

Constitution:

FLA. CONST. art. 4, sec. 4. Cabinet.

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney

general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating commission for the supreme court, or as otherwise provided by general law.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities and shall disburse state funds only upon the order of the comptroller. Such order may be in any form and may require the disbursement of state funds by electronic means or by means of a magnetic tape or any other transfer medium.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

Code:
Fla. Stat. sec. 160.01 (in relevant part).

(4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested,

in the Supreme Court and district courts of appeal of this state.

(5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States. This subsection is not intended to authorize the joinder of the Attorney General as a party in such suits or prosecutions.

Fla. Stat. sec. 16.015 (in relevant part). Legal services; Department of Legal Affairs, other counsel.

The Department of Legal Affairs shall be responsible for providing all legal services required by any department, unless otherwise provided by law.

Hawaii

Constitution:
HAW. CONST. art. 5, sec. 6. Executive and administrative offices and departments.

All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by

and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law. Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session

of the senate. The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

Code:
Haw. Rev. sec. 26-7 (in relevant part). Department of the attorney general.

Haw. Rev. sec. 28-1 (in relevant part). Appears for State.

The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases.

Idaho

Constitution:
IDAHO CONST. art. 4, sec. 1. Executive officers listed-term of office-place of

Residence-duties.

The executive department shall consist of a governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election, commencing with those elected in the year 1946, except as otherwise provided in this Constitution. The officers of the executive department shall, during their terms of office, reside within the state. Their official office shall be located in the county where the seat of government is located, there they shall keep the public records, books and papers. They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law, provided that the state controller shall not perform any post-audit functions.

Code:
Idaho Code sec. 67-1401 (in relevant part). Duties of attorney general.

Except as otherwise provided in this chapter, it is the duty of the attorney general:

1. To perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards, commissions, institutions and other state entities, in all courts and before all administrative tribunals or bodies of any nature. Representation shall be provided to those entities exempted pursuant to the provisions of section.

Illinois

Constitution:
ILL. CONST. art. 5, sec. 1. Officers.

The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their terms of office. (Source: Illinois Constitution.)

Code:
15 Ill. Comp. Stat. 205/4 (in relevant part). The duties of the Attorney General shall be –

First – To appear for and represent the people of the State before the supreme court in all cases in which the State or the people of the State are interested. Notwithstanding this provision, the Office of Public Counsel shall be authorized to represent the interests of the people of the State in all proceedings pertinent to utility regulation, including cases before the supreme court, where any such case is properly brought by the Office pursuant to its statutory duties and powers.

Second – To institute and prosecute all actions and proceedings in favor of or for the use of the State, which may be necessary in the execution of the duties of any State officer.

Third – To defend all actions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States.

Indiana

Code:
Ind. Code sec. 4-6-1-2 (in relevant part). Office created-Election-Term-Time for taking office.

There is created the office of attorney general for the state to be administered by an attorney general who shall be elected under IC 3-10-2-6 by the voters of the state. The term of office of the attorney general is four (4) years, beginning on the second Monday in January after election and continuing until a successor is elected and qualified.

Ind. Code sec. 4-6-1-6 (in relevant part).

All of the rights, powers, and duties conferred by law upon the attorney-general are conferred upon the attorney-general created by this chapter; in addition thereto, the attorney-general shall consult with and advise the several prosecuting attorneys of the state in relation to the duties of their office, and when, in his judgment, the interest of the public requires it, he shall attend the trial of any party accused of an offense, and assist in the prosecution; and shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law.

(Formerly: Acts 1941, c.109, s.6.) As amended by Acts 1978, P.L.2, SEC.402

Iowa

Constitution:
IOWA CONST. art. 5, sec. 12. Attorney general.

The general assembly shall provide, by law, for the election of an attorney general by the people, whose term of office shall be four years, and until his successor is elected and qualifies.

Repealed and rewritten 1972, Amendment [32]

IOWA CONST. art. 5, sec. 13 (in relevant part). Department of justice.

The department of justice, with the attorney general as head thereof, shall be located at the seat of government.

13.2 Duties. (in relevant part).

It shall be the duty of the attorney general, except as otherwise provided by law to:

1. Prosecute and defend all causes in the appellate courts in which the state is a party or interested.

2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

3. Prosecute and defend all actions and proceedings brought by or against any state officer in the officer's official capacity.

4. Prosecute and defend all actions and proceedings brought by or against any employee of a judicial district

department of correctional services in the performance of an assessment of risk pursuant to chapter 692A.

Kansas

Constitution:
KAN. CONST. art. 1, sec. 1. Executive officers; selection; terms.

The constitutional officers of the executive department shall be the governor, lieutenant governor, secretary of state, and attorney general, who shall have such qualifications as are provided by law. Such officers shall be chosen by the electors of this state at the time of voting for members of the legislature in the year 1974 and every four years thereafter, and such officers elected in 1974 and thereafter shall have terms of four years which shall begin on the second Monday of January next after their election, and until their successors are elected and qualified. In the year 1974 and thereafter, at all elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly in such manner as is prescribed by law so that a single vote shall be cast for a candidate for governor and a candidate for lieutenant governor running together, and if such candidates are nominated by petition or convention each petition signature and each convention vote shall be made for a candidate for governor and a candidate for lieutenant governor running together. No person may be elected to more than two successive terms as governor nor to more than two successive terms as lieutenant governor.

Code:
Kan. Stat. Ann. sec. 75-702 (in relevant part). Duties in actions where state a party or interested; or when the constitutionality of a law is at issue.

The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor . . .

Kan. Stat. Ann. sec. 75-708. Performance of other duties required by law. The attorney general shall perform such other duties as may be required of him or her by law.

Kentucky

Constitution:
Ky. Const. sec. 91. Constitutional State Officers.

A Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Labor and Statistics, Secretary of State, and Attorney General, shall be elected by the qualified voters of the State at the same time the Governor and Lieutenant Governor are elected, for the term of four years, each of whom shall be at least thirty years of age at the time of his election shall have been a resident citizen of the State at least two years next before his election. The duties of all these officers shall be such as may be prescribed by law, and the Secretary of State shall keep a fair register of and attest all the official acts of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto before either House of the General Assembly. The officers named in

this section shall enter upon the discharge of their duties the first Monday in January after their election, and shall hold their offices until their successors are elected and qualified. Text as Ratified on: November 3, 1992.

Code:
Ky. Rev. Stat. Ann. sec. 15.020 (in relevant part). Chief law officer and adviser.

Duty to attend to litigation, write opinions, draft writings – shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

Louisiana

Constitution:
La. Const. art. 4, sec. 8. Attorney General; Powers and Duties.

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term

of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure. As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

Code:
La. Rev. Stat. Ann. sec. 36:702 (in relevant part). Powers and duties of attorney general.

In addition to the functions, powers, and duties otherwise vested in the attorney general, he shall:

(1) Represent the public interest in the administration of this Chapter and shall be responsible to the legislature and the public therefor.

(7) Do such other things, not inconsistent with law, as are necessary to perform properly the functions vested in him.

Maine

Constitution:
ME. REV. STAT. CONST. art. 9 sec. 11. Attorney General.

The Attorney General shall be chosen biennially by joint ballot of the Senator and Representatives in convention. Vacancy in said officer occurring when the Legislature is not in session, may be filled by appointment by the Governor, subject to confirmation as required by this Constitution for Justices of the Supreme Judicial Court.

Code:
Me. Rev. Stat. Ann. tit. 5, sec. 191 (in relevant part). Duties; salary; fees; full time.

The Attorney General, a deputy, assistant, or staff attorney shall appear for the State, the head of any state department, the head of any state institution and agencies of the State in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of the officers are called in question, in all the courts of the State; and in such actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either branch thereof. All such actions and proceedings shall be prosecuted or defended by the Attorney General or under the Attorney General's direction. Writs, summonses or other processes served upon such officers shall forthwith be transmitted by them to the Attorney General. All legal services required by such officers, boards and commissions in matters relating to their official duties shall be rendered by the Attorney General or under the Attorney General's direction.

Maryland

Constitution:
MD. CONST. art. 5, sec. 2

All elections for Attorney-General shall be certified to, and returns made thereof by the Clerks of the Circuit Courts for the several counties, and the Clerk of the Superior Court of Baltimore City, to the Governor of the State, whose duty it shall be to decide on the election and qualification of the person returned; and in case of a tie between two or more persons, to designate which of said persons shall qualify as Attorney-General, and to administer the oath of office to the person elected.

MD. CONST. art. 5, sec. 3. Powers and duties of Attorney-General; compensation; Governor not to employ additional counsel unless authorized by legislature

(a) The Attorney General shall:

(1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.

(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have

directed or shall direct to be investigated, commenced and prosecuted or defended.

(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State.

(4) Give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.

(b) The Attorney General shall have and perform any other duties and possess any other powers, and appoint the number of deputies or assistants, as the General Assembly from time to time may prescribe by law.

(c) The Attorney General shall receive for his services the annual salary as the General Assembly from time to time may prescribe by law, but he may not receive any fees, perquisites or rewards whatever, in addition to his salary, for the performance of any official duty.

(d) The Governor may not employ any additional counsel, in any case whatever, unless authorized by the General Assembly.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-103 (in relevant part).

(a) There is an Attorney General of the State, as provided in Article V, § 2 of the Maryland Constitution.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-106 (in relevant part).

(a) Except as otherwise provided by law, the Attorney General has general charge of the legal business of the State.

(b) Except as otherwise provided by law, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-107 (in relevant part).

(a) The Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for:

(1) the Board of Supervisors of Elections of Baltimore City;

(2) the Board of Liquor Commissioners of Baltimore City; and

(3) the Sheriff of Baltimore City.

(b)(1) The Attorney General may advise or represent a political subdivision of the State or any of its officers, employees, or agents as to a matter that relates to State or federal antitrust law.

(2) Representation under this subsection may include an appearance in an action or administrative proceeding to defend the subdivision, officer, employee, or agent.

Massachusetts

Constitution:
MASS. CONST. Ann. Pt. 2, C. II, sec. I., art. IX. Judicial Officers, etc., How Nominated and Appointed.

All judicial officers, [the attorney-general,] the solicitor general, [all sheriffs,] coroners, [and registers of probate,] shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment.

MASS. CONST. Ann. Amend. art. XVII. Election and Tenure of Secretary, Treasurer, Auditor and Attorney-General.

The secretary, treasurer and receiver-general, auditor, and attorney-general, shall be chosen [annually], on the day in November prescribed for the choice of governor; and each person then chosen as such, duly qualified in other respects, shall hold his office for the term of [one year] from the third Wednesday in January next thereafter, and until another is chosen and qualified in his stead. The qualification of the voters, the manner of the election, the return of the votes, and the declaration of the election, shall be such as are required in the election of governor. In case of a failure to elect either of said officers on the day in November aforesaid, or in case of the decease in the meantime of the person elected as such, such officer shall be chosen on or before the third Wednesday in January next thereafter from the [two persons who had the highest number of votes for said offices on the day in November aforesaid] people at large, by joint ballot of the senators and representatives in one room; and in case the office of secretary, or treasurer and receiver-general, or

auditor, or attorney-general shall become vacant from any cause during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large; but if such vacancy shall occur at any other time, it shall be supplied by the governor by appointment, with the advice and consent of the council. The person so chosen or appointed, duly qualified in other respects, shall hold his office until his successor is chosen and duly qualified in his stead. In case any person chosen or appointed to either of the offices aforesaid, shall neglect, for the space of ten days after he could otherwise enter upon his duties, to qualify himself in all respects to enter the discharge of such duties, the office to which he has been elected or appointed shall be deemed vacant. No person shall be eligible to either of said offices unless he shall have been an inhabitant of this commonwealth five years next preceding his election or appointment.

Code:
Mass. Gen. Laws. Ann. sec. 12:3 (in relevant part). Appearances for commonwealth, prosecution or defense; rendering of legal services.

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch

thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

Mass. Gen. Laws Ann. sec. 12:3E (in relevant part). Defense of actions against officers or employees.

Upon the filing with the attorney general of a written request by an officer or employee of any agency within the executive office of health and human services or the department of education, that the attorney general defend him in any action alleging an intentional or unintentional tort or other wrongful act or omission, or violation of the civil rights of any person under any federal or state law, arising out of the operation of said agencies within the executive office of health and human services or of the department of education, the attorney general shall, if after investigation it appears to him that such officer or employee was at the time the cause of action arose acting within the scope of his official duties of employment, take over the management and defense of such action. The attorney general may adjust or settle any such action at any time before, during or after trial, if he finds after investigation that the plaintiff is entitled to damages from such officer or employee.

Mass. Gen. Laws Ann. sec. 12:5 (in relevant part). Civil actions to recover money for commonwealth.

All civil actions to recover money for the commonwealth may be brought in the name of the commonwealth by the attorney general or by a district attorney.

Michigan

Constitution:
MICH. CONST. art. 5, sec. 3 (in relevant part). Single heads of departments; appointment, term.

The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

When a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in this constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. The term of office and procedure for removal of such members shall be as prescribed in this constitution or by law.

Terms of office of any board or commission created or enlarged after the effective date of this constitution shall not exceed four years except as otherwise authorized in this constitution. The terms of office of existing boards and commissions which are longer than four years shall

not be further extended except as provided in this constitution.

History: Const. 1963, art. V, § 3, Eff. Jan. 1, 1964

Code:
Mich. Comp. Laws sec. 14.28 (in relevant part). Attorney general; prosecution and defense of cases in supreme court; solicitor general; intervention or appearance for state on request or own motion.

The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

Mich. Comp. Laws sec. 14.29 (in relevant part). Suits involving state departments.

It shall be the duty of the attorney general, at the request of the governor, the secretary of state, the treasurer or the auditor general, to prosecute and defend all suits relating to matters connected with their departments.

Minnesota

Constitution:
MINN. CONST. art. 5, sec. 1. Executive officers.

The executive department consists of a governor, lieutenant governor, secretary of state, auditor, and attorney general, who shall be chosen by the electors of the state.

The governor and lieutenant governor shall be chosen jointly by a single vote applying to both offices in a manner prescribed by law. [Amended, November 3, 1998] NOTE: The office of the state treasurer will be abolished on the first Monday in January 2003. Laws 1998, chapter 387, article 1, section 2.

Code:
Minn. Stat. sec. 8.01 (in relevant part). Appearance.

The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it.

Mississippi

Constitution:
Miss. Const. Ann. art. 6, sec. 173. Attorney-general.

There shall be an attorney-general elected at the same time and in the same manner as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney-general shall be the same as herein prescribed for judges of the circuit and chancery courts.

Code
Miss. Code Ann. sec. 9-4-3 (in relevant part).

Miss. Code Ann. sec. 7-5-39 (in relevant part). Qualification, election, and duties

He shall have the powers of the Attorney General at common law and is given the sole power to bring or

defend a lawsuit on behalf of a state agency, the subject matter of which is statewide interest, and he shall intervene and argue the constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure. His qualifications for office shall be as provided for chancery and circuit judges in Section 154 of the Mississippi Constitution.

Miss. Code Ann. sec 7-5-39 (in relevant part). To represent the state and state officers in suits.

The attorney general shall also represent the state, in person or by his assistant, as counsel in all suits against the state in other courts than supreme court at the seat of government, and he shall, in like manner, act as counsel for any of the state officers in suits brought by or against them in their official capacity, touching any official duty or trust and triable at the seat of government. He may pursue the collection of any claim or judgement in favor of the state outside of the state.

Missouri

Constitution:
Mo. Const. art. 4, sec. 12. Executive department, composition of-elective officials-departments and offices enumerated.

The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state,

attorney general, a state treasurer, an office of administration, a department of agriculture, a department of conservation, a department of natural resources, a department of elementary and secondary education, a department of higher education, a department of highways and transportation, a department of insurance, a department of labor and industrial relations, a department of economic development, a department of public safety, a department of revenue, a department of social services, and a department of mental health. In addition to the elected officers, there shall not be more than fifteen departments and the office of administration. The general assembly may create by law two departments, in addition to those named, provided that the departments shall be headed by a director or commission appointed by the governor on the advice and consent of the senate. The director or commission shall have administrative responsibility and authority for the department created by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective powers and duties are germane.

Code:
Mo. Rev. Stat. sec. 27-050 (in relevant part). To appear in supreme court and court of appeals, when

The attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors

and those cases in which the name of the state is used as nominal plaintiff in the trial court.

Mo. Rev. Stat. sec. 27-060 (in relevant part). To represent state in other cases.

The attorney general shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

Montana

Constitution:
MONT. CONST. art. 6, sec. 1. Officers.

(1) The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor.

(2) Each holds office for a term of four years which begins on the first Monday of January next succeeding election, and until a successor is elected and qualified.

(3) Each shall reside at the seat of government, there keep the public records of his office, and perform such other duties as are provided in this constitution and by law.

Code:
Mont. Code Ann. sec. 2-15-501 (in relevant part).

(1) to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

(2) to represent the state in all bankruptcy proceedings in which the state's interest may be affected and in other debt collection proceedings at the request of a state agency;

(3) after judgment in any of the causes referred to in subsections (1) and (2), to direct the issuing of a process as may be necessary to carry the judgment into execution;

Nebraska

Constitution:
NEB. CONST. art. 4, sec. 1. Executive departments; officers; when elected; terms; eligibility; books to be kept at seat of government; residence of officers; heads of departments; appointments.

The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish . . . :

Code:
Neb. Rev. Stat. sec. 81-8, 218 (in relevant part). Attorney General; authority.

The Attorney General shall represent the state and employees of the state in any suit brought under the State Tort Claims Act and is authorized to compromise or settle any such suit with the approval of the court in which such suit is pending.

Neb. Rev. Stat. sec. 81-8, 239.06 (in relevant part). Civil action against state officer or employee; Attorney General; represent; cooperation required; payment for defense; when required.

(1) If any civil action is brought against any state officer or employee, such state official or employee may file a written request for counsel with the Attorney General asserting that such civil action is based in fact upon an alleged act or omission in the course and scope of employment. If any state officer or employee is requested to appear before a tribunal and the state may have an interest, such state official or employee may file a written request for representation at the tribunal by the Attorney General asserting that the request to appear is based upon an alleged act or omission in the course and scope of employment. The Attorney General shall thereupon appear and defend or represent that person unless after investigation he or she finds that the claim or demand does not arise out of an alleged act or omission occurring in the course and scope of employment or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case the Attorney General shall give that person written notice that defense of the claim or representation before the tribunal has been rejected.

Nevada

Constitution:
NEV. CONST. art. 5, sec. 22. Duties of certain state officers

The secretary of state, state treasurer, state controller, attorney general, and superintendent of public instruction shall perform such other duties as may be prescribed by law.

Code:
Nev. Rev. Stat. Ann. sec. 228.110 (in relevant part).

1. The attorney general and his duly appointed deputies shall be the legal advisers on all state matters arising in the executive department of the state government.

New Hampshire

Constitution:
N.H. CONST. PART SECOND (Form of Government)(46). Nomination and Appointment of Officers.

All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto.

Code:
N.H. Rev. Stat. Ann. sec. 21-m:5 (in relevant part).

I. Represent the public interest in the administration of the department of justice and be responsible to the governor, the general court, and the public for such administration.

II. The duties of the bureau shall include, but not be limited to, the following:

(a) Providing advice and legal representation in civil matters for all executive branch agencies;

(b) Providing advice and legal representation for the state in land acquisition matters;

(c) Regulating charitable trusts, as provided for by RSA 7:19 through 7:32-a.

New Jersey

Constitution:
N.J. CONST. art. 5, sec. 4, para. 1

Updated Through Amendments Adopted in November, 2000

1. All executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.

Code:
N.J. STAT. sec. 52:17A-1 (in relevant part). Purpose of act.

Department established; appointment and term of Attorney-General

There is hereby established a Department of Law in the State Government.

N.J. STAT. sec. 52:17A-4 (in relevant part). Powers and duties of Division of Law

The powers and duties of the Division of Law shall be the powers and duties now or hereafter conferred upon or required of the Attorney General, either by the Constitution or by the common and statutory law of the State, and as specifically but not exclusively as detailed herein, to wit:

e. Act as the sole legal adviser, attorney or counsel, notwithstanding the provisions of any other law, for all officers, departments, boards, bodies, commissions and instrumentalities of the State Government in all matters other than those requiring the performance of administrative functions entailing the enforcement, prosecution and hearing of issues as imposed by law upon them; and represent them in all proceedings or actions of any kind which may be brought for or against them in any court of this State; and shall likewise interpret all statutes and legal documents, inspect and approve contracts and titles and otherwise control their legal activities;

g. Attend generally to all legal matters in which the State or any officer, department, board, body, commission or instrumentality of the State Government is a party or in which its rights or interests are involved;

New Mexico

Constitution:
N.M. CONST. art. 5, sec. 1. Composition of department; terms of office members; residing and maintaining records at seat of government.

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served two terms in a state office, be ineligible to hold that state office until one further term has been intervened.

The officers of the executive department, except lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

Upon the adoption of this amendment by the people, the terms provided for in this section shall apply to those officers elected at the general election in 1990 and all state executive officers elected thereafter.

Code:
N.M. Stat. Ann. sec. 8-5-1 (in relevant part). Creation of department of justice.

That the department of justice be, and same is hereby created, with the attorney general as head thereof, which shall be located at the seat of government.

N.M. Stat. Ann. Sec. 8-5-2 (in relevant part). Duties of attorney general.

Except as otherwise provided by law, the attorney general shall:

A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;

B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor;

C. prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity;

New York

Constitution:
NY CLS Const. art. 5, sec. 1. Comptroller and attorney-general; payment of state moneys without audit void.

The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 or [of] * article IV. The legislature

shall provide for filling vacancies in the office of comptroller and of attorney general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor.

NY CLS Const. art. 5, sec. 4. Department heads.

The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. . . .

Code:
NY CLS Exec. sec. 63 (in relevant part). General duties.

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

North Carolina

Constitution:
N.C. Const. art. 3, sec. 7. Other elective officers.

A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of

January next after their election and continue until their successors are elected and qualified.

Code:
N.C. Gen. Stat. sec. 114-2 (in relevant part). Duties.

It shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

North Dakota

Constitution:
N.D. Const. art. 5, sec. 2

The qualified electors of the state at the times and places of choosing members of the legislative assembly shall choose a governor, lieutenant governor, agriculture commissioner, attorney general, auditor, insurance commissioner, three public service commissioners, secretary of state, superintendent of public instruction, tax commissioner, and treasurer. The legislative assembly may by law provide for a department of labor to be administered by a public official who may be either elected or appointed.

The powers and duties of the agriculture commissioner, attorney general, auditor, insurance commissioner, public

service commissioners, secretary of state, superintendent of public instruction, tax commissioner, and treasurer must be prescribed by law. If the legislative assembly establishes a labor department, the powers and duties of the officer administering that department must be prescribed by law.

Code:
N.D. Cent. Code sec. 54-12-01 (in relevant part). Attorney general – Duties.

The attorney general shall:

1. Appear for and represent the state before the supreme court in all cases in which the state is interested as a party.

2. Institute and prosecute all actions and proceedings in favor or for the use of the state

which may be necessary in the execution of the duties of any state officer.

3. Appear and defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or of the United States. If both parties to an action are state officers, the attorney general may determine which officer he will represent and the other officer may employ counsel to represent him.

Ohio

Constitution:
Ohio Const. art. 3, sec. 1. Executive department.

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state,

treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general.

Code:
Ohio Rev. Code Ann. sec. 9.41 (in relevant part).

§ 109.02 Duties as chief law officer.

The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.

Oklahoma

Constitution:
OKLA. CONST. art. 6, sec. 1. Executive officers enumerated – Offices and records – Duties.

A. The Executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, State Treasurer, Superintendent of Public Instruction, Commissioner of Labor, Commissioner of Insurance and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.

Code:
Okla. Stat. tit. 74, sec. 18b (in relevant part). Duties of Attorney General – Counsel of Corporation Commission as representative on appeal from Commission.

A. The duties of the Attorney General as the chief law officer of the state shall be:

1. To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party;

2. To appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party;

10. To institute actions to recover state monies illegally expended, to recover state property and to prevent the illegal use of any state property, upon the request of the Governor or the Legislature;

16. To institute civil actions against members of any state board or commission for failure of such members to perform their duties as prescribed by the statutes and the Constitution and to prosecute members of any state board or commission for violation of the criminal laws of this state where such violations have occurred in connection with the performance of such members' official duties;

20. To represent and protect the collective interests of all utility consumers of this state in rate-related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding;

21. To represent and protect the collective interests of insurance consumers of this state in rate-related proceedings before the Insurance Property and Casualty Rate Board or in any other state or federal judicial or administrative proceeding;

Oregon

Code:
Or. Rev. Stat. sec. 180.010 (in relevant part). Office of Attorney General.

There is established the office of Attorney General of the State of Oregon.

Or. Rev. Stat. sec. 180.060 (in relevant part). Powers and duties of Attorney General.

(1) The Attorney General shall:

(a) Appear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.

(b) Appear for the state, when required by the Governor or the legislature, in any court or tribunal in any cause in which the state is a party or in which the state is directly interested.

(c) Appear, commence, prosecute or defend for the state all causes or proceedings in the Supreme Court or the Court of Appeals in which the state is a party or interested.

(d) Appear, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court when

requested by any state officer, board or commission when, in the discretion of the Attorney General, the same may be necessary or advisable to protect the interests of the state.

Pennsylvania

Constitution:
Pa. Const. art. 4, sec. 1. Executive department.

The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe.

Pa. Const. art. 4, sec. 4.1. Attorney General.

An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer; he shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive terms; he shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

Code:
Pa. Stat. Ann. tit. 71, sec. 732-204 (in relevant part). Legal advice and civil matters.

(3) It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the

absence of a controlling decision by a court of competent jurisdiction.

(C) Civil litigation; collection of debts. – The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute. The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly indexed, of all such claims, showing whether they are in litigation and their nature and condition. The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. The Attorney General shall approve all settlements over such maximum amounts as he shall determine arising out of claims brought against the Commonwealth pursuant to 42 Pa.C.S. § 5110.

(E) Limitations in civil litigations. The Attorney General shall not agree to the entry of a consent decree in any action against the Commonwealth or any agency without

the approval of the Governor and notice to the General Assembly through the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives.

Rhode Island

Constitution:
R.I. Const. art. 9, sec. 12. Powers and duties of secretary, attorney-general, and general treasurer.

The duties and powers of the secretary, attorney-general and general treasurer shall be the same under this Constitution as are now established, or as from time to time may be prescribed by law.

Code:
R.I. Gen. Laws sec. 42-9-1 (in relevant part). Head of department – Assistants.

(a) There shall be a department of the attorney general. The head of the department shall be the attorney general who shall have supervision over the department and shall appoint thirty (30) assistant attorneys general.

R.I. Gen. Laws sec. 42-9-6 (in relevant part). Legal adviser – Representation of state officers and agencies.

Except as otherwise in the general laws provided, the attorney general, whenever requested, shall act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall

institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, *commissioners*, and officers, in all suits and proceedings which may be brought against them in their official capacity.

South Carolina

Constitution:
S.C. CONST. Ann. art. 4, sec. 15. Faithful execution of laws.

The Governor shall take care that the laws be faithfully executed. To this end, the Attorney General shall assist and represent the Governor, but such power shall not be construed to authorize any action or proceeding against the General Assembly or the Supreme Court.

Code:
S.C. Code Ann. sec. 1-7-40 (in relevant part). Appearance for State in Supreme Court and other courts and tribunals.

He shall appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General Assembly.

S.C. Code Ann. sec. 1-7-50 (in relevant part). Defense of actions against public officers and employees.

In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any

action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor or assistant solicitor when directed to do so by the Attorney General.

S.C. Code Ann. sec. 1-7-55 (in relevant part). Counterclaims, cross-actions, or other actions on behalf of public officers and employees.

When the Attorney General undertakes to defend any civil action or proceeding on behalf of any officer or employee of the State, or of any political subdivision of the State, he may, in his discretion, upon the request of the officer or employee, enter and prosecute a counterclaim, cross-action, or any other appropriate action in the suit on behalf of the officer or employee.

South Dakota

Constitution:
S.D. CONST. art. 4, sec. 7. Other executive officers – Powers and duties.

There shall be chosen by the qualified electors of the state at the general election of the Governor and every four years thereafter the following constitutional officers: attorney general, secretary of state, auditor, treasurer, and

commissioner of school and public lands, who shall severally hold their offices for a term of four years. Commencing with the 1992 general election, no person may be elected to more than two consecutive terms as attorney general, secretary of state, auditor, treasurer, or commissioner of school and public lands.

Code:
S.D. Codified Laws sec. 1-11-1 (in relevant part). General duties of attorney general. The duties of the attorney general shall be:

(1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party;

Tennessee

Constitution:
TENN. CONST. art. 7. sec. 5. Attorney general and reporter.

An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years. An Attorney for the State for any circuit or district, for which a Judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the State five years, and of the circuit or district one year. In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore.

Code:
Tenn. Code Ann. sec. 8-6-109. Duties.

(1) The trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state may be interested;

(2) To attend to all business of the state, both civil and criminal in the court of appeals, the court of criminal appeals and the supreme court;

(9) To defend the constitutionality and validity of all legislation of statewide applicability, except as provided in subdivision (b)(10), enacted by the general assembly, except in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly;

Texas

Constitution:
TEX. CONST. art. 4, sec. 22. Attorney General.

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever

sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

Code:
Tex. Gov't. Code sec. 402.021 (in relevant part).

The attorney general shall prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals.

Utah

Constitution:
UTAH CONST. art. 7, sec 16. Duties of Attorney General.

The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.

Code:
Utah Code Ann. sec. 67-5-17 (in relevant part).

(1) perform all duties in a manner consistent with the attorney-client relationship under Section 67-5-17;

(2) except as provided in Sections 10-3-928 and 17-18-1, attend the Supreme Court and the Court of Appeals of this state, and all courts of the United States, and prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and take charge, as attorney, of all civil legal matters in which the state is interested;

(a) if civil, the nature of the demand, the stage of proceedings, and when prosecuted to judgment, a memorandum of the judgment and of any process issued whether satisfied, and if not satisfied, the return of the sheriff.

Vermont

Constitution:
VT. CONST. ch 2 sec. 43. Biennial elections.

The Governor, Lieutenant-Governor, Treasurer, Secretary of State, Auditor of Accounts, Senators, Town Representatives, Assistant Judges of the County Court, Sheriffs, High Bailiffs, State's Attorneys, Judges of Probate and Justices of the Peace, shall be elected biennially on the first Tuesday next after the first Monday of November, beginning in A.D. 1914.

Code:
Vt. Stat. Ann. tit 3 sec. 152 (in relevant part). Scope of authority.

The attorney general may represent the state in all civil and criminal matters as at common law and as allowed by statute. The attorney general shall also have the same authority throughout the state as a state's attorney.

Virginia

Constitution:
VA. CONST. art. 5, sec. 15. Attorney General.

An Attorney General shall be elected by the qualified voters of the Commonwealth at the same time and for the same term as the Governor; and the fact of his election

shall be ascertained in the same manner. No person shall be eligible for election or appointment to the office of Attorney General unless he is a citizen of the United States, has attained the age of thirty years, and has the qualifications required for a judge of a court of record. He shall perform such duties and receive such compensation as may be prescribed by law, which compensation shall neither be increased nor diminished during the period for which he shall have been elected. There shall be no limit on the terms of the Attorney General.

Code:
Va. Code Ann. sec. 2.2-507 (in relevant part).

A. All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission. No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official. The Attorney General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity.

B. The Attorney General may represent personally or through one of his assistants any of the following persons who are made defendant in any civil action for damages arising out of any matter connected with their official duties:

1. Members, agents or employees of the Alcoholic Beverage Control Board;

2. Agents inspecting or investigators appointed by the State Corporation Commission;

3. Agents, investigators, or auditors employed by the Department of Taxation;

4. Members, agents or employees of the State Mental Health, Mental Retardation and Substance Abuse Services Board, the Department of Mental Health, Mental Retardation and Substance Abuse Services, the State Board of Health, the State Department of Health, the Department of General Services, the State Board of Social Services, the Department of Social Services, the State Board of Corrections, the Department of Corrections, the State Board of Juvenile Justice, the Department of Juvenile Justice, the Virginia Parole Board, or the Department of Agriculture and Consumer Services;

5. Persons employed by the Commonwealth Transportation Board;

6. Persons employed by the Commissioner of Motor Vehicles;

7. Persons appointed by the Commissioner of Marine Resources;

8. Police officers appointed by the Superintendent of State Police;

9. Game wardens appointed by the Department of Game and Inland Fisheries;

10. Third impartial panel members appointed to hear a teacher's grievance pursuant to § 22.1-312;

11. Staff members or volunteers participating in a court-appointed special advocate program pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1; or

12. Any emergency medical service agency that is a licensee of the Department of Health in any civil matter and any guardian ad litem appointed by a court in a civil matter brought against him for alleged errors or omissions in the discharge of his court-appointed duties.

Washington

Constitution:
WASH. CONST. art. 3, sec. 1. Executive department.

The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

Code:
Rev. Code Wash. (ARCW) sec. 43.10.030 (in relevant part).

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States;

West Virginia

Constitution:
W. VA. CONST. art. 3, sec. 1. Executive Department.

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be, ex officio, reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

Code:
W. Va. Code sec. 5-3-1 (in relevant part).

The attorney general shall give written opinions and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so.

Wisconsin

Constitution:
WIS. CONST. art. 6, sec. 3. Treasurer and attorney general; duties, compensation.

The powers, duties and compensation of the treasurer and attorney general shall be prescribed by law.

Code:
Wis. Stat. sec. 165.25 (in relevant part).

(1) Represent State. Except as provided in s. 978.05 (5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The public service commission may request under s. 196.497 (7) that the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455 (1) (d).

(a) At the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer,

employee or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employee or agent for or on account of any act growing out of or committed in the lawful course of an officers', employees' or agents' duties.

Wyoming

Constitution:
WYO. STAT. sec. 9-1-601. Appointment; term; removal; special assistant for legislative affairs; qualifications.

(a) The attorney general of the state of Wyoming shall be appointed by the governor with the advice and consent of the senate in accordance with W.S. 28-12-101 through 28-12-103 and may be removed by the governor as provided in W.S. 9-1-202.

(b) If a newly elected governor appoints an attorney general to take office prior to or during the legislative session next following the governor's election, the newly appointed attorney general designee shall become a member of the attorney general's staff to serve as a special assistant to the governor for legislative affairs. When the legislative session adjourns the attorney general's term of office shall terminate.

(c) Prior to his appointment, the attorney general shall have been a practicing attorney for at least four (4) years. At the date of appointment, he shall be in good standing in the courts of record of this state and shall be a resident and elector of the state.

(i) Prosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;

(ii) Represent the state in criminal cases in the supreme court;

(iii) Defend suits brought against state officers in their official relations, except suits brought against them by the state;

(iv) Represent the state in suits, actions or claims in which the state is interested in either the Wyoming supreme court or any United States court;

Code:
Wyo. Stat. sec. 9-1-603 (in relevant part).

(a)(i) Prosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;

(iii) Defend suits brought against state officers in their official relations, except suits brought against them by the state;

(iv) Represent the state in suits, actions or claims in which the state is interested in either the Wyoming supreme court or any United States court.

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